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In the Supreme Court of the United States

OCTOBER TERM, 1997

UNITED PAPERWORKERS INTERNATIONAL UNION AND UNITED PAPERWORKERS LOCAL UNION NO. 1033, PETITIONERS

v.

ROLAND BUZENIUS AND NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether a union-security clause in a collective bargaining agreement that requires employees to become and remain "members of the Union in good standing" as a condition of continued employment is facially violative of Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. 158(a)(3), absent a concurrent definition in the agreement of "member in good standing."

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OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-13a) is reported at 124 F.3d 788. The decision and order of the National Labor Relations Board (Pet. App. 14a-20a) and the decision of the administrative law judge (Pet. App. 23a-35a) are reported at 320 N.L.R.B. 349.

JURISDICTION

The judgment of the court of appeals was entered on September 8, 1997. The petition for a writ of certiorari was filed on December 8, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 8(a)(3) of the National Labor Relations Act (Act), 29 U.S.C. 158(a)(3), makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." That same paragraph, however, permits an employer to make an agreement with a labor organization "to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment." The paragraph further provides, however, that membership must be equally available to all employees on the same terms and conditions and may require employees to do no more than "tender the periodic dues and the initiation fees uniformly required."

This Court has held that, under that paragraph, " 'membership' as a condition of employment is whittled down to its financial core." *NLRB* v. *General Motors Corp.*, 373 U.S. 734, 742 (1963). All that may be required as a condition of employment is "payment of initiation fees and monthly dues." *Ibid.* An employee may resign full union membership without suffering discharge and may not be discharged for failing to abide by union rules or policies with which he disagrees. *Pattern Makers' League of North America* v. *NLRB*, 473 U.S. 95, 106 (1985). Finally, this Court has made clear that employees who are not union members need not pay fees or dues to the extent they "support union activities beyond those germane to collective bargaining, contract administration, and grievance adjustment." *Communications Workers* v. *Beck*, 487 U.S. 735, 745 (1988).

2. Petitioners, United Paperworkers International Union and its Local 1033 (Unions), are the exclusive bargaining representatives for a bargaining unit of the production and maintenance employees of Weyerhaeuser Paper Company (Company). The Unions and the Company entered into a collective bargaining agreement containing the following union-security clause:

> It is agreed that all employees who are members of the Union shall remain members of the Union in good standing. All new employees, who after the completion of thirty (30) days shall become and remain members in good standing as a condition of this employment.

Pet. App. 24a.

Roland Buzenius has worked for the Company for 15 years, was a member of the Unions, and served as president of Local 1033 in 1990 and 1991. Pet. App. 24a. By letters dated April 30, 1993, he resigned his membership in both the Local and the International and requested that the payments required of him under the union-security clause be reduced to reflect his right under *Beck* to object to supporting financially the Unions' activities unrelated to collective bargaining. *Id.* at 24a-25a. The Unions ignored Buzenius's letters, and dues continued to be deducted from his paycheck in the same amount as they had prior to his letters. Moreover, in November 1993, the Unions mailed Buzenius a new union-membership card. *Id.* at 3a, 25a.

3. Based on charges filed by Buzenius, the General Counsel of the National Labor Relations Board (Board) issued a complaint alleging that the Unions had violated their duty of fair representation under

Section 8(b)(1)(A) of the Act, 29 U.S.C. 158(b)(1)(A), by failing to acknowledge Buzenius's resignation from full membership, and by failing to inform him and other employees of their rights under *General Motors* to refrain from full membership and under *Beck* to object to paying the costs of union activities unrelated to collective bargaining. Pet. App. 23a. The Board sustained the allegations of the complaint. *Id.* at 14a-19a.

The Board explained that, in *California Saw & Knife Works*, 320 N.L.R.B. 224 (1995), enforced *sub nom. International Ass'n of Machinists* v. *NLRB*, Nos. 96-1246, 96-2928 & 96-3467, 1998 WL 10595 (7th Cir. Jan. 14, 1998), issued the same day, the Board had ruled that a union violates its duty of fair representation by failing to provide notice of *Beck* rights to unit employees covered by a union-security agreement who are not members of the union. Pet. App. 15a. The Board further explained that, in so ruling, it had stated that, "in order to fully inform non-member employees of their *Beck* rights, a union must [also] tell them . . . of their *General Motors* rights to be and remain nonmembers." *Id.* at 15a-16a (quoting *California Saw*, 320 N.L.R.B. at 235 n.57).

Noting that the "complaint in the instant case alleges the unlawful failure to inform *all unit employees*, including those who are still members of the Union, of their rights under *Beck* and *General Motors*," the Board concluded that "the rationale of *California Saw* for concomitant notice of *Beck* and *General Motors* rights applies with no less force to those who are still full union members and who did not receive those notices before they became members." Pet. App. 16a. Accordingly, the Board ordered the Unions to honor Buzenius's resignation

from full membership, to refund excess deductions from his pay and reduce future deductions, and to notify all employees covered by the union-security clause of their rights to refrain from full union membership and to object to the payment of full union dues. *Id.* at 20a-22a, 34a-35a.

4. Buzenius sought review in the court of appeals of the Board's failure to order expunction from the collective bargaining agreement (CBA) of the union-security clause requiring employees to become and remain "members of the Union in good standing." Pet. App. 2a-4a.[1] The court agreed with Buzenius's contention that the clause is "facially invalid" because "the express language of this clause is inconsistent with [the] employees' right to refuse to join the Union or pay full dues, so long as they pay that portion of dues related to core representational activities, and because the clause cannot be interpreted without resort to material outside of the CBA." *Id.* at 12a. Therefore, the court held that "the Board abused its discretion in refusing to order that the clause requiring that employees be 'members of the Union in good standing' either be modified to define that requirement or be removed from the CBA." *Id.* at 12a-13a.

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[1] The parties did not raise, and the court of appeals did not discuss, whether the Board's failure to require expunction of the clause caused Buzenius injury-in-fact sufficient to give him standing to challenge the order in the court of appeals. Nor do we press that issue now, because, as we explain below, further review of this case is not warranted given the Board's decision to reconsider its position on whether clauses of the type Buzenius challenges here are in fact facially invalid and should be expunged.

ARGUMENT

Petitioners contend (Pet. 7-8) that the decision of the Sixth Circuit in this case is in accord with the decision of the Eighth Circuit in *Bloom* v. *NLRB*, 30 F.3d 1001 (1994), but conflicts with decisions of the District of Columbia, the Seventh, and the Ninth Circuits. See *International Union of Electronic Workers (I.U.E.)* v. *NLRB*, 41 F.3d 1532, 1538-1539 (D.C. Cir. 1994); *Nielsen* v. *International Ass'n of Machinists*, 94 F.3d 1107, 1113-1115 (7th Cir. 1996), cert. denied, 117 S. Ct. 1426 (1997); *Marquez* v. *Screen Actors Guild, Inc.*, 124 F.3d 1034, 1039 (9th Cir. 1997), petition for cert. pending, No. 97-1056. Petitioners further claim (Pet. 9) that the Sixth Circuit's decision "flies in the face of the plain language of [Section] 8(a)(3), that provision's legislative history and this Court's decisions construing that statutory language." Finally, petitioners argue that "the thousands of employers and unions, who for the last 40 years have negotiated union shop clauses in precisely the form provided by the NLRB,[2] are left in complete uncertainty as to the continued validity of their agreements," absent resolution of the issue. Pet. 7.

Even if there were some substance to petitioner's contentions, the petition should be denied, because the Board has decided to reconsider its position on the validity of clauses conditioning employment on union "membership" when the clauses are contained in collective bargaining agreements that do not spell out the limited membership obligations that can be

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[2] See *Keystone Coat, Apron & Towel Supply Co.*, 121 N.L.R.B. 880, 884 (1958).

compelled under the clauses. Because the Board's reconsideration may render obsolete any present disagreement among the courts of appeals and any attendant uncertainty created by that disagreement, resolution by this Court of the issue presented in this case is not warranted at this time.

Board Chairman Gould has indicated that he agrees with the Sixth Circuit's holding that union-security clauses requiring unit employees to become "members of the Union in good standing" are facially invalid. He has explained that, because "a union-security clause may lawfully compel only the payment of fees and dues related to representational activities," a "collective-bargaining agreement that speaks in terms of 'membership' or 'membership in good standing' without further definition misleads employees into believing that they can be terminated if they do not become formal, full-fledged union members" and pay "full dues." *Monson Trucking, Inc.*, 324 N.L.R.B. No. 149 (Oct. 31, 1997), slip op. 7 (Chairman Gould concurring);[3] see also *Internationl Bhd. of Teamsters, Local 443 (Connecticut Limousine Service, Inc.)*, 324 N.L.R.B. No. 105 (Oct. 2,

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[3] Chairman Gould added that "a union-security clause that requires 'membership' or 'membership in good standing' without concurrent definition of that term in the collective-bargaining agreement [also] undercuts and dilutes the notice which the Board established in *California Saw & Knife [Works,]*" 320 N.L.R.B. 224, 231-235 (1995), enforced *sub nom. International Ass'n of Machinists v. NLRB*, Nos. 96-1246, 96-2928 & 96-3467, 1978 WL 10595 (7th Cir. Jan. 14, 1988), for "[t]his notice is not adequate where the collective-bargaining agreement sends a contrary message and instruction to employees within the bargaining unit." *Monson Trucking, Inc.*, slip op. 7-8.

1997), slip op. 6 n.1 (Chairman Gould dissenting in part).

Although the other Board members have not yet reached a decision on the issue, they have agreed that reconsideration of the Board's former position is warranted. Accordingly, the Board has authorized its General Counsel to seek a remand of cases pending decision in the courts of appeals that present the issue of the facial validity of union-security clauses requiring employees to become and remain "members of the union in good standing" as a condition of continued employment.[4]

The Board's reconsideration of its position on the issue in this case may well lead to resolution of the conflict in the courts of appeals, a conflict that petitioners overstate in any event.[5] The Board is

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[4] Motions for remand were filed in *Bloom* v. *NLRB*, No. 97-1582 (8th Cir.); *Orce* v. *NLRB*, No. 97-4038 (2d Cir.); and *Cecil* v. *NLRB*, No. 97-5302 (6th Cir.). The Eighth Circuit has granted the Board 90 days in which to reconsider its decision in *Bloom*. The Second Circuit denied a remand in *Orce*, but, after hearing oral argument, entered, on December 9, 1997, a summary order dismissing as moot Orce's petition for review. The Sixth Circuit has not acted on the motion for remand in *Cecil*. The Board does not seek remand in the present case because the court of appeals has already issued a decision.

[5] The decision by the court of appeals in this case does conflict with the decisions of the D.C. Circuit in *I.U.E.*, *supra*, and the Seventh Circuit in *Nielsen*, *supra*. Neither the Eighth Circuit in *Bloom* v. *NLRB*, 30 F.3d 1001 (1994), however, nor the Ninth Circuit in *Marquez*, *supra*, decided the precise issue presented here—whether a clause requiring employees to become "members of the Union in good standing" is facially unlawful absent further definition of the relevant terms. The Eighth Circuit ruled that a similar clause should have been expunged "[b]ecause the overly broad union security clause was

entitled to "considerable deference" in its interpretation of the Act. See *NLRB* v. *Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786 (1990). Accord *Auciello Iron Works, Inc.* v. *NLRB*, 116 S. Ct. 1754, 1759 (1996); *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27, 42 (1987). The courts must defer to the Board's construction of the Act if its interpretation is "reasonable" even if the courts would interpret the statute differently. *Pattern Makers' League of North America* v. *NLRB*, 473 U.S. 95, 114 (1985) (citing *Ford Motor Co.* v. *NLRB*, 441 U.S. 488, 497 (1979)); *International Ass'n of Machinists* v. *NLRB*, Nos. 96-1246, 96-2928 & 96-3467, 1998 WL 10595, at *7 (7th Cir. Jan. 14, 1998). The deference due the Board is not defeated because the Board changes its position. See *Curtin Matheson*, 494 U.S. at 787 (citing *NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251, 265-266 (1975), and *NLRB* v. *Local Union No. 103, Iron Workers*, 434 U.S. 335, 351 (1978)).

Both courts of appeals decisions that conflict with the decision in this case rested in part on deference to the Board's prior position that union security clauses of the type challenged here are not facially invalid. See *I.U.E.*, 41 F.3d at 1536 (noting that the NLRB found that the challenged clause was not facially invalid and later noting deference due the Board's decision); *Nielsen*, 94 F.3d at 1114-1115 (relying in part on the position of the NLRB and its General

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unlawfully interpreted and applied" but did not find that the clause was "facially invalid." See *Bloom*, 30 F.3d at 1005. The Ninth Circuit held that a union did not violate its duty of fair representation by negotiating a clause of the type challenged here, and, although it relied on *I.U.E.* and *Nielsen*, the court of appeals did not expressly rule on the facial validity of the clause. See *Marquez*, 124 F.3d at 1039.

Counsel in holding the challenged union security clause to be facially valid). If a majority of the Board were to agree with Chairman Gould and change the Board's position to accord with the holding of the Sixth Circuit in this case, the other courts of appeals would likely uphold that interpretation of the Act.

The task of "effectuat[ing] national labor policy" by "striking th[e] balance" among competing interests in the work place is "often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review." *NLRB* v. *Truck Drivers Local Union No. 449*, 353 U.S. 87, 96 (1957). Because of the complex and competing interests involved, the Board generally has exclusive jurisdiction in the first instance to interpret Section 8 of the Act. See *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236 (1959). And, if a reviewing court finds the Board's interpretation unjustifiable, the court should generally remand to the Board to allow it to reconsider the interpretation in the first instance. See *NLRB* v. *Food Store Employees Union, Local 347*, 417 U.S. 1, 9-10 (1974). The concerns undergirding those principles also suggest that, when the Board has clearly indicated its intention to reconsider its interpretation of the Act, this Court should await the Board's reconsideration before rendering a definitive interpretation. Accordingly, it would be premature in the present circumstances for the Court to undertake to resolve the question that the petition for certiorari presents.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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